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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the matter of )

Implementation of Section )  
309(j) of the Communications Act )

PP Docket No. 93-253

TO: The Commission

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

**PETITION FOR SPECIAL AND EXTRAORDINARY RELIEF**

Kingdon R. Hughes ("Hughes") by his attorneys and pursuant to Section 1.2104(i) of the Commission's Rules, requests of the Commission special and extraordinary relief in connection with the recent Interactive Video and Data Service ("IVDS") auction, held July 28-29, 1994. Due to acts of fraud and gross misrepresentation perpetrated on the auction floor, Hughes and many other bidders who legitimately participated in the auction, have been damaged.<sup>1</sup>

**I. NATURE OF CLAIM**

This is not a claim of "buyer's remorse." Hughes is a legitimate bidder who has complied with all FCC regulations and has and will continue to pay all sums required in connection with the IVDS markets for which he was the high bidder at auction. Hughes files this petition for one reason: He has been damaged by fraudulent bidding activity on the part of one or more bidders at the auction. Specifically, Hughes was outbid by insincere bidders for his markets of choice. As a result, when the Commission re-auctions the defaulted markets, Hughes will be denied the opportunity to bid on markets he would prefer to own simply because

<sup>1</sup> There is no doubt that Hughes has standing to file this petition as he can demonstrate injury from the fraudulent activity and that the injury is within the zone of interests to be protected. FCC v. Sanders Bros., 309 U.S. 470 (1940).

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all of his IVDS auction capital is committed to the markets Hughes purchased at the auction. Hughes seeks redress from the Commission.

## **II. BACKGROUND**

### **A. Hughes' Application**

1. Hughes holds an FCC license to provide IVDS to the Philadelphia MSA (Call sign KIVD0008). Hughes entered the Commission's auction with the intention of bringing IVDS to the public at the earliest possible date. Hughes was the high bidder in seven markets, pledging a total of \$1,930,000, without Designated Entity ("DE") credits.<sup>2</sup> On August 8, Hughes made the required 20% down payment and on August 15 he submitted applications for these markets, which were accepted for filing.<sup>3</sup>

### **B. Events at the Auction**

2. At the auction, several bidders dominated the bidding in the largest MSAs. For example, of the top 50 MSAs, Commercial Realty St. Pete, Inc. ("CRSP") won 17 markets and Interactive America, Inc. ("IAI") won nine markets. Hughes does not believe that CRSP was outbid in a single market that it attempted to acquire in the top MSAs. These two entities were consistently willing to bid higher than even the most aggressive competitors. They bid up prices far higher than industry observers expected.<sup>4</sup>

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<sup>2</sup> Hughes' markets are Allentown-Bethlehem-Easton, PA-NJ; Trenton, NJ; Lancaster, PA; Vineland-Millville-Bridgeton, NJ; Reading, PA; Wilmington, NJ-DE-MD; and Duluth, MN-WI.

<sup>3</sup> See, *Public Notice*, Report No. DA 94-1031, released September 22, 1994.

<sup>4</sup> For example, RTT Corp., ("RTT"), an IVDS equipment developer, predicted auction values of approximately \$0.10 per pop, which prediction has been well publicized in the trade press and previously submitted to the Commission. The average auction price for the top markets was over \$1.00 per pop.

3. The amounts bid by CRSP and others drove the market price for top MSAs. Sincere bidders received a clear signal as to the value of these markets and, as the auctioneer moved down the list and bid prices declined from the highs set by CRSP, they did so at levels above true market value. Sincere bidders such as Hughes were unwittingly forced to compete against multiple fraudulent bidders. Unfortunately, the signals received by other bidders as to value came from those who did not have sufficient funds or the intention to make the required payments.

**C. Events After the Auction**

4. Following the auction, CRSP refused to make the required down payments for its markets, citing unavailability of equipment and other excuses. A number of other parties did likewise. Several parties present at the auction have reported that representatives of CRSP and other defaulting bidders, prior to the August 8 payment deadline, actively sought to obtain financing to meet the required down payments. These insincere multiple defaulters represent a significant portion of the largest MSAs. Because CRSP and apparently others did not have the required financial qualifications to participate at the auction, a large fraud has been perpetrated on the Commission.<sup>5</sup>

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<sup>5</sup> Hughes is well aware of the Commission's ongoing investigation into auction misconduct. *See Order* in GN Docket No. 94-96, FCC 94-222, released August 30, 1994.

### **III. FRAUDULENT BIDDING HAS TAINTED THE ENTIRE AUCTION PROCESS.**

#### **A. Most Bidders Paid Artificially Inflated Prices.**

5. Obviously, bidders who competed against CRSP paid higher prices than they otherwise would have if all bidders were sincere. More damaging, however, is that CRSP and other bogus bidders set an artificially high market value for properties generally, causing many others to bid more than they otherwise would have. Hughes is harmed by artificially inflated prices on several levels. First, and most important, soaring prices forced Hughes out of the market for larger properties he had hoped to acquire. This is the central damage suffered by many bidders due to artificially inflated prices -- bona fide applicants could not acquire their target properties because they were outbid by disingenuous bidders. To illustrate, Hughes was outbid in his attempts to acquire San Antonio, Tulsa, Denver, Sacramento, Reno, Austin, San Jose, and Ventura. Hughes now has all of his auction capital tied up in the seven markets he purchased. As a result, he has no capital left to bid on the markets to be re-auctioned. In several other markets he did not bid at all because early bids exceeded his estimate of the market's worth.

6. Second, Hughes conservatively estimates that he paid at least double what he should have for the markets he purchased. This amounts to at least a \$1 million dollar loss. These dollars are not only lost to Hughes, but they are now unavailable for system construction and operating costs, a result which grossly disserves the public interest in having first rate systems rapidly deployed. Conversely, because his allocated capital is virtually exhausted, Hughes has not only lost the opportunity to bid at re-auction, but he could have acquired more properties at the first auction.

**B. The Entire IVDS Marketplace is Adversely Affected.**

7. It is not only those markets in which CRSP or other bogus bidders participated that suffer harm. The IVDS marketplace as a whole is damaged. An examination of CRSP's bidding patterns reveals that in most instances it bid on the largest market within an ADI, but did not bid for surrounding markets. As a result, where CRSP defaulted in a large market, winning bidders in small markets within the same ADI will likely commence service without the corresponding benefits of large market advertising and promotion typically carried over local media.

8. Further, the prospect of linking local facilities to provide, for example, economies of scale which would increase a system's competitiveness and economic viability has been harmed. This is especially acute where the competing IVDS markets within the ADI do not contain defaulters. Competitors will not only have a head start, but they will have a crucial competitive advantage in attracting investment capital, advertisers, program producers and joint venture partners.

9. Finally, the ability of IVDS licensees to form a nationwide network will be retarded by the inherent delays caused by litigation and the re-auction process. This is an especially damaging blow in view of the fact that IVDS is positioned in an extremely competitive arena, with a limited amount of spectrum and throughput capability, facing RBOCs and cable television companies as rivals.

**C. The Commission Anticipated That This Problem Could Arise in Open Outcry Auctions and a Remedy is Available.**

10. In its *Second Report and Order*, FCC 94-61, released April 20, 1994, the Commission recognized the possibility that withdrawn bids could harm other bidders, stating,

"Provided that other bidders are also not held to their bids (so they are not committed to bids based on faulty estimates of common values inferred from the withdrawn bid), the only damage from such withdrawal would be delay". Without a doubt, a winning bid implies or signals value to other bidders. When a high bid is withdrawn during an auction, other bidders reassess the item being auctioned, recognizing that the high bid was not the true value. On re-auction, the item will almost always bid at a lower level. Where a bid was withdrawn during the auction, the Commission properly determined that the next-highest bidder(s) should not be held to their bids because they were based upon faulty assumptions.

11. Likewise, where a multiple default occurs, it is apparent that many bidders inferred faulty values. CRSP and others sent strong and faulty signals throughout the auction floor concerning property values and those faulty signals were picked up by all other bidders. Some declined to bid and were denied opportunity. Others, like Hughes, bid more than they should have or were denied the opportunity to bid on properties of choice. Through no fault of the Commission, the process has been skewed and relief to those who have been harmed is available and should be offered.

#### **IV. RELIEF REQUESTED.**

12. The Commission has plenary power to ensure that the public interest in having fair and competitive auctions is served. In particular, Section 1.2104(i) provides, in pertinent part, that:

[t]he Commission may delay, suspend, or cancel an auction in the event of...security breach, unlawful bidding activity, administrative necessity, or for any other reason that affects the fair and efficient conduct of the competitive bidding. The Commission also has the authority, at its sole discretion, to resume the competitive bidding...or cancel the competitive bidding in its entirety.

Hughes believes that the fraudulent bidding activity carried out by CRSP and others irreparably demolished the fair and efficient conduct of competitive bidding. Hughes requests the Commission to implement one or more remedies as follows:

**A. Suspend Processing of Applications and Auction Payments.**

13. At a minimum, the Commission must suspend processing of pending IVDS applications and auction payments until its investigation of CRSP and others is completed. To the extent that an Administrative Law Judge concludes that CRSP engaged in improper or illegal activity, the not inconceivable prospect of unwinding the entire process becomes nearly impossible if licenses have been issued and service has commenced. Until the Commission's investigation concludes, licensees will have a difficult time entering the business, simply because lenders will be reluctant to finance an industry with such a significant cloud hanging over it. In similar circumstances in the 220 MHz proceeding, the Commission extended system construction deadlines until the *Evans* case was settled.<sup>6</sup> Here, granting applications will only invite a flood of petitions to extend construction deadlines. The more efficient course is to delay grants until this matter is resolved.

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<sup>6</sup> See GN Docket No. 93-252 and *Evans v. FCC*, Case No. 92-1317 (D.C. Cir. filed July 30, 1992).

14. In addition, there is no valid public interest reason to require further payments while application processing is suspended. It is inappropriate to require *bona fide* licensees to make further financial commitments during this period of uncertainty. Finally, this is a perfect time to suspend processing, as the Commission has concluded its initial review of all applications and released its September 22 list of those which are acceptable for filing. Upon concluding the CRSP investigation and the ultimate resolution of this matter, the Commission can promptly grant applications as appropriate.

**B. Grant Payment Relief.**

15. The Commission may grant payment relief across the board to auction winners, using any number of options. For example, the Commission may declare a payment discount, based upon the average percentage difference, on a per pop basis, between markets won by CRSP and markets won by *bona fide* bidders. Other options include extension of the payment term, reduction in the prevailing interest rate, and reduction in the amount of principal due during the first three years of the license term, although none of these options would affect Hughes.

**C. Increase Good Faith Deposits for Re-auctioned Markets.**

16. When the defaulted markets are re-auctioned, the Commission should increase the amount bidders must pay in advance to participate at auction. In other auctions, where the Commission has employed a down payment based on "MHz pops", defaults have not occurred. Alternatively, Hughes suggests that a prospective bidder deposit twenty percent (20%) of the maximum amount it plans to bid at the auction. For example, a bidder putting up \$20,000 would be eligible to bid up to \$100,000. Either fix proposed here would be relatively easy to



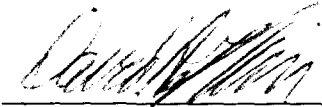
implement and would make the penalty for bid withdrawal more severe, thus discouraging insincere bidding. A party should not be permitted on the auction floor unless they have sufficient liquid capital to meet the down payment requirement for the properties it intends to bid on.

## **V. CONCLUSION**

It is incumbent upon the Commission to acknowledge the damage done by insincere bidders at the IVDS auction and provide relief for those bidders who put money at risk and who seek to capitalize on the opportunity IVDS affords. Hughes urges the Commission to act swiftly to assist legitimate bidders by ensuring that IVDS is launched in a manner which gives bidders a reasonable chance at developing a successful business.

Respectfully submitted,

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